IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ———.

SLACK BROS., INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

1. In construing the "prima facie evidence" and the "presumption" arising from the margin computations prescribed by Section 907 as controlling when substantial rebutting evidence is introduced compelling findings of fact that the periods are not comparable.

2. In holding that the experience of another period (1936) has no probative rebuttal value.

3. In failing to hold that evidence of prices being the same during the taxpayer's tax period marketing season as they were in the season immediately preceding the tax is relevant.

ARGUMENT.

Effect of the Presumption.

Congress itself indicated the weight and nature of the presumption in Subdivision (e) of Section 907, reading in part:

> "Either the claimant or the Commissioner may *rebut* the presumption established by Subsection (a) of this Section by proof of the *actual extent* to which the claimant shifted to others the burden of the processing tax." (Italics supplied.)

Statutory presumptions, fundamentally, fall into one of three groups:

(1) An inference or assumption which must be drawn by the trier of facts from a given fact or set of facts with an operative effect only upon the burden of going forward with the production of evidence; when any rebutting evidence is produced the presumption is dissolved (the Court held the presumption to be of this type in *Commissioner* v. *Bain Peanut Co.* (134 F. (2d) 853) and in *Webre Steib Company Ltd.* v. *Commissioner* (140 Fed. (2d) 768) (Certiorari applied for this day) but failed to so hold in the instant case and in *Caldwell Sugars, Inc.*—Certiorari applied for this day).

(2) An inference which must be drawn but which places upon the opponent the burden of persuading the trier that the presumed fact does not exist; i.e., the presumption shifts the burden of persuasion, i.e., of proof; and

(3) An inference which must be drawn and must be used by the trier with the evidence; it may have an effect upon the burden of producing evidence, but the satisfaction of the burden does not totally destroy the presumption, for its effect as evidence remains.

It is submitted that the language used by Congress in Subdivision (e) indicates that it intended the presumption to have the effect of either (2) or (3). In the case of *Annis-*

ton Manufacturing Company v. *Davis*, 301 U. S. 337, 354, this Court did not construe Section 907 as did the Circuit Court of Appeals in the present case. The Supreme Court said (page 354):

> "But it cannot be said that the comparison set up between the results of operations during the 'tax period' and the 'period before or after the tax' are wholly irrelevant."

And again (page 355), this Court said:

> "The permissible, and we think the true, construction of Section 907 (e) is that the words '*actual* extent' are used in contradistinction to the *presumed* extent, according to the prima facie presumption to which the proof in rebuttal is addressed. In the light of the context, and of the entire scheme of the administrative proceeding, we are of the opinion that the provision was intended to afford, and does afford, full opportunity to the claimant to present any evidence which may be pertinent to the questions to be determined by the Board of Review and which may be appropriate to overcome any presumption which might be indulged under Section 907 (a) or otherwise."

Observe that the Court speaks of proof in *rebuttal* and evidence to *overcome* the presumption, not merely dissolving it by the production of some evidence.

It is suggested that the Court below missed the real distinction between the presumption upheld in the *Turnipseed* case and the one held to be invalid in the *Henderson* case; the real distinction being that in the former there was "some rational connection between the fact proved and the ultimate fact presumed"; whereas, in the latter case this reasonable connection was absent, the Court saying:

> "The mere fact of a collision between a railway train and a vehicle at a highway grade crossing furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone."

There is no constitutional inhibition against a presumption such as (2) and (3) above which may shift to the opponent the burden of persuasion or which remains in the case as evidence even after some rebutting evidence is produced. The real ground upon which the state statutory presumption was held invalid in the *Henderson* case was because it was unreasonable and arbitrary and denied the railway company a fair opportunity to repel it. This Court has already held in the *Anniston Manufacturing Company* case that the presumption here is not unreasonable or arbitrary.

In the case of *Heiner* v. *Donnan*, 285 U. S. 312, 329, this Court recognizes that a rebuttable presumption may have the effect of shifting the burden of proof.

It has been repeatedly held that statutory presumptions, admittedly constitutional, do affect the burden of proof and are to be considered as evidence. As an illustration, the Internal Revenue Act now in effect and those for several years back contain a provision with respect to estate taxes that any transfer of a material part of his property made by a decedent within two years prior to his death without consideration shall, unless shown to the contrary, be deemed to have been made in contemplation of death. This provision shifts to the taxpayer the burden of overcoming this presumption by satisfactory proof; and no Court has held that the presumption is unconstitutional or that it is dissolved merely upon the introduction of some proof of a rebuttable nature.

Shwab v. *Doyle*, 269 Fed. 321 (C. C. A. Sixth) (reversed on another point 258 U. S. 529), dealing with this statute, says (page 333):

> "The provision in question raises a presumption of fact, not a presumption of law, and under well-settled rules a presumption of fact may be taken into account in determining the ultimate fact. * * * Unless the statutory presumption may properly be taken into account in determining the ultimate fact, it has no office. Elements which, in the absence of evidence to the contrary,

> are made sufficient to conclusively establish the ultimate fact, cannot be said to have no evidentiary influence in reaching that conclusion."

Other cases to a similar effect are *Myers* v. *U. S.*, 2 Fed. Supp. 1000, 1006 (Court of Claims), Writ refused 292 U. S. 629; *Myers* v. *McGruder*, 15 Fed. Supp. 488, 496; *Land Title & Trust Company* v. *McCaughn*, 7 Fed. Supp. 742, 744.

In *James-Dickinson Farm Mortgage Company* v. *Harry*, 273 U. S. 119, the Court says (page 124):

> "It is well settled that a state may consider proof of one fact presumptive evidence of another, if there is a rational connection between them, and also that it may change the burden of proof."

Hawes v. *Georgia*, 258 U. S. 431, involved the prohibition laws of Georgia which provided that when any distilling apparatus is found upon the premises same shall be prima facie evidence that the person in possession of the premises had knowledge of the existence thereof. In a prosecution under this statute the burden of proof of course was on the state to show the defendant's guilt, but it was held that when proof of possession was furnished the burden then shifted to the defendant to show his lack of knowledge. The Court said:

> "The establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law."

The Court below observed in the *Bain* case (*supra*) that "the law governing burden of proof is a matter of substance," citing *Central Vermont Railway Co.* v. *White*, 238 U. S. 507;

Granting that the law governing burden of proof is a matter of substance, we submit that to construe the presumption here as one shifting the burden of proof would

not result in changing the substantive law. The substantive law during the course of the hearing and at its end is the same as it was when the hearing began; the rule with respect to the statutory presumption was in effect before the hearing and remained the same throughout the hearing. In the case of *Central Vermont Ry. Co.* v. *White,* the Court was dealing with the question as to whether or not, in the particular case for personal injuries brought under a Federal statute but in a State court, the plaintiff had the burden of proving a lack of contributory negligence as required by the state rule or whether the burden was on the defendant to plead and prove the existence thereof as required by the practice in the Federal courts. The Court merely held that the rule with respect to the burden of proof was a matter of substance and not a matter of procedure, and therefore it would be assumed that Congress intended that the Federal rather than the State rule should prevail in all suits brought under the Federal Act.

Cited above in *Hawes* v. *Georgia,* wherein a statute was upheld which raised a presumption of guilty knowledge from proof of possession, and shifted to the defendant the burden of disproving such knowledge. Similarly, in *Yee Hem* v. *U. S.*, 268 U. S. 178, there was involved a prosecution for the offense of concealing smoking opium after importation with knowledge that it had been imported in violation of the Federal Act, the law providing, among other things, that "possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury." The burden of course was on the prosecution to prove the guilt of the defendant beyond a reasonable doubt; but, possession having been proved, the burden shifted to the defendant to avoid conviction by producing satisfactory explanation of such possession. Although this presumption resulted in the shifting of the burden of proof, it was upheld, the Court saying (page 184):

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not arising under the statute."

That the burden of persuasion (i.e. of proof) may shift during trial as the result of a presumption is further illustrated in criminal prosecutions where defendant interposes a plea of insanity. The burden of proof is on the defendant to show that he was insane at the time of the criminal act. But this burden shifts if proof is made that at a prior date he had been adjudged insane; the presumption that such insane condition continued to exist after the date of its judicial determination then places on the prosecution the burden of proving that at the time of the commission of the offense the accused was sane. (*Witty* v. *State*, 171 S. W. 229).

To say that a particular presumption has the effect only of requiring the adversary to produce some proof in rebuttal and then disappears would, in the case of trials in the District Courts, have the effect of transferring jury functions to judges, as Mr. Justice Black points out in his dissenting opinion in *New York Life Insurance Company* v. *Gamer* (303 U. S. 161, 172), in that thereby the trial judge would be given the right to weigh the rebutting evidence and "decide when sufficient evidence has been introduced to take from the jury" the right to find in favor of the presumed fact even though the jury might disbelieve the rebutting evidence or give less weight thereto than does the trial judge.

Hence we urged that the Court below misconstrued the terms "prima facie evidence" and "presumption" as used in Section 907, both in the *Bain* and *Webre* cases as well as

in the instant and *Caldwell* cases; that the presumption remained only as evidence to be rebutted or overcome by proof "of the actual extent to which the claimant shifted to others the burden of the processing tax".

The Court Improperly Held That the 1936 Crop Experience Had No Probative Value.

Once The Tax Court made findings establishing the fact that the base period was not a period, comparable in every respect with the tax period—then, as stated in *Epstein* v. *Helvering* (120 Fed. (2d) 427) (4 C. C. A.):

> "It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

In the *Epstein* case the Court included the post-tax period and in *Arkwright Mills* v. *Commission* (127 F. (2d) 465) the Court included a period eighteen months after the statutory period in order to determine the actual extent of the burden borne.

Here Slack advanced the first crop year after the statutory base period. The Tax Court found that the quota system of control remained in effect. The period is therefore comparable with the tax period, and a computation of margins based on such period shows that Slack bore the entire burden of the tax.

Now, whether we call it a substitute period or rebuttal makes no difference—the fact remains that it demonstrates clearly that some other factor than the tax is responsible for the increased margin. Whether it be that the statutory margin period is subnormal and therefore shows a subnormal margin; or, whether it be that the quota control system created new conditions permitting larger margins, makes no difference—the fact remains that from the incep-

tion of the quota control and tax, margins were better and when the tax was dropped margins were still better. Is this not clear relevant evidence that some other factor than the tax was responsible for the improved margin?

Hence we submit that the 1936 crop experience is relevant and does establish the actual extent of the tax burden borne.

The Court Improperly Failed to Consider the Actual Selling Prices During the Marketing Season.

It is conceded by the litigants and the Courts that unless the tax was passed on in the selling price it was borne by Slack. There is no contention that it was passed back or otherwise recouped. Slack markets its sugar between October and the following January or February, at least to the extent of 80 to 97 per cent (R. 51-52) of its production. If the prices during the tax period are no higher than they were during the preceding marketing season, is that not convincing evidence that the tax was borne by Slack? The Court should have found that fact. It was in evidence. It has been stipulated (R. 51-52).

Hence, we submit that Slack has shown that the actual extent to which it bore the burden of the tax is the full burden of the tax.

CONCLUSION.

For the reasons stated in the foregoing petition and supporting brief, it is respectfully submitted that this petition for writ of certiorari should be granted.

C. J. Batter,
902 American Security Building,
Washington, D. C.,
Counsel for Petitioner, Slack Bros., Inc.